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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

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| PUBLIC INQUIRY CONCERNING THE TERMS OF 39 U.S.C. § 404(d) | Docket No. PI2016-2 |

**UNITED STATES POSTAL SERVICE REPLY COMMENTS ON THE INTERPRETATION OF TERMS RELATED TO 39 U.S.C. § 404(d)**
**(March 29, 2016)**

## I. INTRODUCTION

On or about February 5, 2016, the Postal Service and several interested parties ("Commenters") filed comments in this proceeding in response to Postal Regulatory Commission ("Commission") Order No. 2862, issued December 10, 2015. Commenters have urged the Commission to expand its jurisdiction by requiring 39 U.S.C. § 404(d) appeals for various actions associated with almost all types of retail postal facilities, in addition to "Post Offices," as the term has been defined by the Postal Service in its role as the nation's mail system provider. In taking this position, Commenters have reached beyond relevant statutory language, legislative history, and judicial precedent. Commenters have also taken positions beyond the scope of this limited proceeding as framed by the Commission. Finally, Commenters have discounted the Postal Service's efforts to consider the mailing public's concerns about Post Office closings and consolidations in its notice and comment rulemaking, as well as the judicially-established *Chevron* deference to which it is entitled.

## II. COMMENTERS CRITICIZE THE POSTAL SERVICE'S TREATMENT OF STATIONS AND BRANCHES, BUT THE AGENCY APPLIES THE SAME CLOSING PROCEDURES TO THESE FACILITIES AS IN 39 U.S.C. § 404(d)

Commenters are dissatisfied with the Postal Service's approach to the closing or consolidation of stations and branches. For example, Commenter Steve Hutkins criticizes the Postal Service's treatment of certain postal facilities, urging the Commission to rule that "all post offices, including stations and branches, are subject to 404(d)." Hutkins Comments at 11. But the Postal Service's current regulations provide affected citizens with the same administrative rights and due process considerations for a proposed station or branch closing as they provide for a "Post Office" closing.

### A. The Postal Service has established a reasonable approach to closing stations and branches.

As explained in its initial comments filed in this proceeding, the Postal Service's regulations, finalized and published in 2012, make a reasonable distinction between stations and branches (subordinate units) and Post Office units. *See* United States Postal Service Comments on the Interpretation of Terms Related to 39 U.S.C. § 404(d) ("Postal Service Comments") at 5-9. Despite this distinction, on a practical level, persons served by a retail facility are now accorded the same careful consideration by the Postal Service when challenging decisions impacting a Postal Service-operated station or branch. *See* 39 CFR § 241.3(a)(1)(i)(C) ("The rules cover any proposal to … [d]iscontinue a USPS-operated Post Office, station, or branch…."). The regulation has established the same 60-day notice and comment period for any replacement or discontinuance action involving a Post Office, branch, or station; in addition, postal officials must consider factors such as effect on the community served, effect on employees, economic savings, etc. 39 CFR §

241.3(a)(3). Mandatory procedures must also be followed, including receipt of public comments and issuance of a written final determination taking such comments into account. *Id.* The only substantive difference is that the regulation affords Section 404(d) Commission appeal rights only to "Post Offices," as the Postal Service has reasonably defined that term, consistent with statutory language and case law precedent.

### B. Contrary to Commenters' claims, the Postal Service's notice and comment rulemaking from 2011-12 has taken the public's views into consideration concerning the discontinuance process for Post Offices, stations, and branches.

As noted in its Initial Comments, in 2011-12, the Postal Service undertook a transparent process in soliciting and responding to the public's concerns in developing the Final Rule for its revised 39 CFR Part 241 regulations. Postal Service Comments at 8-9; 76 Fed. Reg. 17,794-801 (Proposed rule); 76 Fed. Reg. 41413-424 (Final rule); 76 Fed. Reg. 43,898 (Final rule; correction); 76 Fed. Reg. 66,184-187 (subsequent Final rule). Despite this effort, the National Association of Postmasters of the United States ("NAPUS") claims the Postal Service "dismissed" its objections to the agency's revised definition of Post Office "consolidations." NAPUS Comments at 2. The Postal Service respectfully disagrees. In addition to the details of the rulemaking referenced in its Comments, the Postal Service specifically addressed NAPUS's concerns about the new regulation's definition of "consolidation":

> That the Postal Service's previous interpretation of "consolidation" was found to be reasonable does not mean that that interpretation is the only reasonable and valid one…. In the proposed rule and this final rule, the Postal Service has explained why it is reasonable to revise its interpretation of "consolidation"….

76 Fed. Reg. at 66,185.

Thus, far from ignoring public concerns raised in the rulemaking process, the Postal Service carefully took them into account as part of its process in establishing its new discontinuance regulations.

## III. COMMENTERS IGNORE LEGISLATIVE HISTORY, STATUTORY LANGUAGE, AND CASE LAW PRECEDENT IN URGING THEIR OWN DEFINITIONS OF KEY TERMS

Commenters have proposed a definition of "Post Office" that encompasses any facility that provides service (Hutkins Comments at 9; *see also* Popkin Comments at 2). Commenters also suggest that a closure or consolidation should be defined as the "loss of any building." Association of United States Postal Lessors ("AUSPL") Comments at 2. Defining these key terms in such a way defies the statutory text, as well as its legislative history.

### A. Commenters do not consider the overall context of the Postal Reorganization Act (PRA) 1976 amendments.[1]

The Postal Reorganization Act (PRA) 1976 amendments[2] established the 404(d) appeals process and sought to limit *Post Office* closures by granting the public a right to appeal a Postal Service determination to discontinue service. The 1976 amendments of the PRA were developed with small, rural Post Offices in mind. H.R. 8603 provides the context and purpose of appeals legislation. The primary goal of the PRA, as it was originally written, and as the Postal Service applies it today, is to protect rural and small

[1] Pub. L. No. 94-421, 90 Stat. 1303 (1976).

[2] *Id.* at 1310.

town Post Offices[3] and to provide citizens served by postal facilities in those communities recourse in the event of a closure:

> The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services shall be insured to residents of both urban and rural communities.

39 U.S.C. § 101(b).

The PRA was not developed with the express or implied intention of permanently "protecting" stations, branches, or contract postal facilities. In their suggestions to the Commission regarding facility closures, Commenters disregard foundational legislation and its application in 404(d) cases, which provides guidance for 404(d) jurisprudence.

1. **There is no principled, legal justification to treat all facilities equally when its determination results in a closure.**

Commenters attempt to put forth a definition of "Post Office" that is overly broad and impractical, and seemingly outside the context of the 1976 Amendments to the PRA. *See, e.g.,* Popkin Comments at 2 ("The Postal Service … should consider all facilities equally when the level of service is being changed."); Hutkins Comments at 7 ("Patrons of all retail postal facilities should be provided with the same opportunity to appeal a closing."). Commenters contend that colloquial definitions of "Post Office" and "closing" can be applied without any understanding of postal operations. There is no support in the statutory text for this approach. The 1976 Amendments repeatedly reference "Post Offices," but do not make mention of contractor-operated retail facilities, or stations or branches, in the context of a closure. This omission was not by accident. The Postal Service has drawn distinctions between stations, branches, and Post Offices since the

[3] *Id.* at pp. 349-350.

nineteenth century.[4] Thus, in debating the 1976 Amendments to the PRA, members of Congress gave careful consideration to the language used to shape the legislation.

**2. The PRA gives the Postal Service broad discretion in decision-making.**

The PRA was enacted in part to create a more efficient Postal Service to respond to the changing needs of the American public; this resulted in providing the agency greater discretion in arranging its operations, apart from outside interference. Courts have recognized this general rule of discretion for the Postal Service. *See, e.g., Buchanan v. USPS* 508 F.2d 259, 262 (5th Cir. 1975) (under the PRA, "[p]ostal management was left with broad decision-making power….").

Part of that general discretion concerns the Postal Service's arrangement of its facilities[5]; while 404(d) represents a check on this discretion, it would be illogical to read that part of the statute as swallowing it in whole, and at least one court has affirmed as much. In *Shepard Community Association v. USPS*, Civ. No. C2-82-425 (S.D. Ohio 1985) (unpublished), the U.S. District Court for the Southern District of Ohio was faced with a

[4] The earliest known Post Office branch was established in New York City on January 1, 1837 to satisfy merchants and banks that complained that the main Post Office had been relocated "too far up-town." *See* Stations and Branches, Historian, United States Postal Service (Jan. 2006), at https://about.usps.com/who-we-are/postal-history/stations-branches.pdf, citing "The New York Post-Office," *Appleton's Journal: a Monthly Miscellany of Popular Literature*, September 1878, 193.

[5] General powers granted to the Postal Service under the PRA include the power to:

> acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor….

39 U.S.C. § 401(5).

Specific powers granted include the power to:

> determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed….

39 U.S.C. § 404(a)(3).

complaint by a group of citizens opposing the Postal Service's decision to close the Shepard, Ohio Station in 1981. *See* Memorandum and Order (October 7, 1985) at 1. The court ruled that the closing of a "postal station" does not implicate 404(d):

> While the Postal Service is required to consider community input when closing that community's post office or consolidating the post office with that of a larger city, the Service must have the flexibility to control the arrangement of other postal facilities within the jurisdiction of a city's main post office…. The Service would be unduly hampered if section 404([d]) were construed to apply to every decision to rearrange the location of postal facilities within a city to better serve areas experiencing shifts in population, to accommodate for the building of new, more efficient facilities, or simply to discontinue unnecessary or outdated postal facilities.

*Id.* at 15-16.

In contrast to the above, many Commenters would have the Commission review every Postal Service decision affecting the curtailment or transfer in some form of every type of Postal Service facility. Such an approach is not logical, workable, or consistent with the PRA. The statute does not promote perfectly convenient postal services, but instead only "effective and regular" service. 39 U.S.C. § 404(d)(2)(A)(iii). Under this statutory standard, the Postal Service is entitled to a greater degree of discretion in its facility decisions than the Commenters assert.

### B. Commenters do not consider the import of the legislative history in defining "Post Office" and "closing," which are not defined in the PRA statute.

The Supreme Court noted in *Caminetti v. U.S.*, 242 U.S. 470 (1917), that legislative history "may be helpful" in determining the intent of the drafters. In its initial comments in this proceeding, the Postal Service noted that the 1976 amendments to the PRA provide a means of defining terms such as "post office," which is not defined in the statute. *See* Postal Service Comments at 9-10.

The Commenters do not consider legislative history in taking their positions. Even assuming that the legislative history does not work to definitively define a term such as "Post Office," "it is clear that the legislators intended to distinguish between Post Offices and other types of postal facilities." *Shepard, supra,* at 8. Hence, courts have noted that the 1976 amendments to the PRA were passed "in response to Congressional concern that the USPS would close Post Offices in rural areas or small towns in the name of economy…." *Id.* (noting the Randolph Amendment's limitations to section 404); *accord Knapp,* 449 F. Supp.158, 161-62 (E.D. Mich. 1978).[6]

The Postal Service continues to urge the Commission to take the PRA's legislative history into account as it considers the meaning of terms like "Post Office."[7]

### C. Case law precedent supports the Postal Service's understanding of "Post Office" and "closing" and not that of the commenters.

The Commenters would give the Postal Service very little leeway, if any, in making decisions about how its facilities should be arranged; it is as if the 39 U.S.C. § 404(d) restriction on "the closing or consolidation of any post office" applies to any decision

[6] The *Shepard* court also noted other legislative history sources for the 1976 PRA amendments that are relevant to the issues raised in this proceeding:

> Perhaps the strongest indication that Congress intended to distinguish post offices from branches and substations is found in the House Conference Report from the conference committee for the legislation – "The managers intend that this provision [Section 404(d)] apply to post offices only and not to *other postal facilities*." H.R. Rep. 94-1444, 94th Cong. 2d Sess. 17, reprinted in 1976 U.S. Code Cong. & Ad. News, 2434, 2440.

*Shepard* at 9 (emphasis added).

[7] It is also worth noting that recent proposed postal reform legislation includes language that defines "post offices" more broadly, specifically including other types of retail postal facilities. *See* S. 1486, "Postal Reform Act of 2014," *and* Sen. Carper's proposed "iPOST" legislation (www.carper.senate.gov/postal reform/) (each bill defining "post office" as "a post office, post office branch, post office classified station, or other facility that is operated by the Postal Service, the primary function of which is to provide retail postal services.") The implication of the above language in these bills is that the current PRA's definition of "post office" is limited to Post Offices, and should Congress intend to apply section 404(d) appeal rights to other types of retail facilities, it may only be accomplished by amendment to the statutory text. Unless or until that occurs, however, the Postal Service continues to assert that its interpretation of "post office" is a reasonable one that is entitled to deference.

affecting any building in the Postal Service network. But courts have not looked at 404(d) this expansively.

**1. Unlike the Commenters, courts have recognized the Postal Service's need for flexibility in its management decisions.**

The court in *Wilson v. U.S. Postal Service*, 441 F. Supp. 803 (C.D. Cal. 1977), noted the "conflicting policies" of the PRA: "the freedom [for postal management] to make decisions without external constraints" versus "providing the American people a public service which is sensitive and responsive to their needs." *Id.* at 805. In balancing these two statutory imperatives, however, the *Wilson* court concluded that Section 404(d) was not intended to undermine the broad management power of the Postal Service; thus, the court ruled that the relocation of mail processing facilities did not constitute the "consolidation" envisioned by 404(d). *Id.* at 806.

The courts in *Knapp, supra*, and *Citizens for the Hopkins Post Office v. U.S. Postal Service*, 830 F. Supp. 296 (D.D.C. 1993), reached similar conclusions. The *Knapp* court ruled that 404(d) did not apply to a postal management plan to relocate bulk mail sorting operations in the Detroit metropolitan area, while the *Hopkins* court held that the transfer of casing operations and several employees from one Post Office to another did not constitute a consolidation under 404(d).

The Postal Service notes that the Commission has determined that Postal Service operational decisions that result in the relocation or rearrangement of services in different physical locations do not constitute a closing or consolidation, even when a Postal Service brick and mortar facility is shuttered. *See* Postal Service Comments at 12-14 (discussion of the Commission's *Oceana Station, Venice Post Office,* and *Santa Monica Post Office* orders). Thus, unlike the Commenters, both courts and the Commission have recognized

that 39 U.S.C. § 404(d) is limited in scope and does not apply to every Postal Service management decision affecting its physical facilities.

**2. The Postal Service's definitions of terms such as "closing" and "consolidation" are entitled to *Chevron* deference.**

As noted in its initial comments, under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984), the Postal Service should be accorded deference when reasonably interpreting the PRA, its enabling statute. *See* Postal Service Comments at 2-4. The Postal Service has undertaken a transparent rulemaking process in developing definitions for such terms as "Post Office," "closing," and "consolidation." In its initial comments in this proceeding, the Postal Service explained why it distinguishes between different types of facilities (Post Offices, stations, etc.): these distinctions form the basis for the agency's definitions of these terms, developed through the rulemaking process. *See* Postal Service Comments at 5-9.

Considering this rulemaking, as well as *Chevron* deference and the Commission's limited role in reviewing Postal Service operational decisions (*see* Postal Service Comments at 3-4), it is the Postal Service's understanding and interpretation of these terms that should control.[8]

[8] The Public Representative has seemingly challenged the concept, established in the text of the PRA (*see* 39 U.S.C. § 405(d)(5)), that the Commission's jurisdiction over Postal Service facilities decisions is limited:

> When the Commission finds it lacks jurisdiction, it eliminates the public's opportunity to challenge whether the Postal Service has afforded adequate process to the public concerning the closing or consolidation.
> . . .
> The Public Representative recommends against issuing generalized jurisdictional interpretations relying on specific facts.

Public Representative's Comments on the Commission's Ability to Review Postal Service Determinations to Close or Consolidate Any Post Office at 3-4.

## IV. COMMENTERS' POSITIONS GO BEYOND THE SCOPE OF THE COMMISSION'S JURISDICTION AND THIS PROCEEDING

In a number of instances, commenters' suggestions, opinions, and interpretations of 404(d) are beyond the scope of the Commission's review in this docket. Individual commenters suggest that the Commission should interpret the statute as "broadly and robustly" as possible.[9] This is a matter for Congress, not the Commission, to decide.

The notion that the Commission can interpret the statute in such a way as to broaden its own jurisdiction misses the mark and is beyond the scope of this docket. This docket is limited to what, in the commenters' views, constitutes relocation or rearrangement of postal services, and is thus exempt from Commission review, pursuant to Section 404(d); and when or if the Commission should have jurisdiction to review the closing or consolidation of a Contract Postal Unit (CPU). Notice at 2.

The Postal Service reminds individual commenters that they were tasked with providing input into the boundaries of the Commission's jurisdiction in the context of Section 404(d). Notice at 2. The jurisdictional boundaries have already been established. As explained in the Postal Service's initial comments, the *Chevron* doctrine applies to an agency's interpretation of its own laws. Postal Service Comments at 2-5. In analyzing

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The Postal Service respectfully disagrees with the Public Representative's position. First, if the Commission never fails to "find it lacks jurisdiction," a citizen could bring any complaint before the Commission, beyond the scope of the PRA; this would lead to illogical results, such as challenges to the closings of non-retail, nonpublic-facing facilities like carrier annexes and mail processing centers. Second, it would appear that the Commission's role as an adjudicator is precisely to issue "generalized jurisdictional interpretations relying on specific facts": taking a legal rule and applying it to a specific set of facts is how the Commission (or a court) develops its legal holdings.

[9] *See* Jamison Comments at 4 ("the Commission should, to the greatest extent possible, interpret the sections of the statute with regard to appeals as broadly and robustly as can legally be justified."); *see also* Lessors Comments at 5 ("the Commission should seek to retain the broadest interpretation of its review jurisdiction as is justified under statute."); and Hutkins Comments at 5 ("Given that appealing a post office closing is a basic right…the Commission should take the broadest interpretation of the statute that is reasonably legitimate.").

whether an agency should be accorded deference, the relevant issues include: (1) whether Congress has directly spoken to the question at issue; and (2) if congressional intent is unclear, whether the agency's answer is based upon a permissible construction of the statute. *See* Postal Service Comments at 2-4. Here, with respect to 404(d), the Postal Service has engaged the public in developing statutory provisions related to closures, consolidations, and other relevant service changes via rulemaking. Given the number of appeals to the Commission deemed to be outside the scope of section 404(d), it seems congressional intent is sufficiently unclear and step two of *Chevron* analysis is warranted. Through reexamination of whether the Postal Service's construction of its own statute is permissible, the analysis under *Chevron* instructs that the Postal Service, as the agency empowered and governed by Title 39 of the United States Code, has authority to interpret its own statute. It is therefore not up to the Commission to expand or contract its jurisdictional reach, because to do so would be inconsistent with the statutory language and general deference owed to the Postal Service under *Chevron*.

Furthermore, Section 404 states that the Commission may not modify the determination of the Postal Service to close or consolidate any Post Office. 39 U.S.C. § 404 (d)(5)(C). Therefore, in addition to *Chevron* deference, the PRA statute itself recognizes a limited role for the Commission in reviewing the agency's administrative decisions. *See* Postal Service Comments at 2-4.

## V. CONCLUSION

In light of the foregoing, the Postal Service submits that its interpretation of 39 U.S.C. § 404(d) has been made sufficiently clear for the purpose of both serving the public and for postal operations. Commenters have ignored the statutory language of the PRA,

legislative history, and case law precedent in their approach to defining terms such as "Post Office." Commenters also urge a broadening of Commission jurisdiction and power, contrary to both the PRA and the instructions of the Commission in this particular proceeding. Commenters and other parties have had the opportunity to address issues related to the administration of postal facilities through the notice and comment rulemaking process, and the Postal Service has carefully considered the public's concerns in finalizing its Post Office discontinuance regulations in 2012. Finally, the Postal Service is in the best position to define key operational terms and should be accorded *Chevron* deference.

Respectfully submitted,

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